

# Law Office of Jack Silver

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***Via Certified Mailing -  
Return Receipt Requested***

March 4, 2013

James Drake  
Owner and Registered Agent  
Drake Marine, Inc.  
671 Marina Blvd.  
South San Francisco, CA 94080

**Re: Notice of Violations and Intent to File Suit Under the Federal Water  
Pollution Control Act ("Clean Water Act")**

Dear Owner, Operator and/or Facility Manager:

## **NOTICE**

This Notice is provided on behalf of California River Watch ("River Watch") with regard to violations of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1251 *et seq.*, that River Watch believes are occurring at Drake Marine located at 671 Marina Boulevard in South San Francisco. Notice is being sent to you and Drake Marine, Inc., hereafter referred to as the "Discharger," as the responsible owner, officer, operator or manager of the South San Francisco marine facility. This Notice addresses the unlawful discharge of pollutants through one or more storm drains from the Drake Marine facility into south San Francisco Bay.

CWA § 505(b) requires a citizen to give notice of the intent to file suit sixty (60) days prior to the initiation of a civil action under Section 505(a) of the Act (33 U.S.C. § 1365(a)). Notice must be given to the alleged violator, the U.S. Environmental Protection Agency ("EPA"), and the state in which the violations occur. As required by the CWA, this Notice provides notice of the violations that have occurred, and continue to occur at the Drake Marine facility. Consequently, the Discharger is placed on formal notice by River Watch that

after the expiration of 60 days from the date of this Notice, River Watch will be entitled to bring suit in the U.S. District Court against the Discharger for continuing violations of an effluent standard or limitation, permit condition or requirement, or Federal or State Order or Plan issued under the CWA in particular, but not limited to CWA § 505(a)(1), 33 U.S.C. § 1365(a)(1), the Code of Federal Regulations, and the Regional Water Quality Control Board's Water Quality Control Plan ("Basin Plan,") as exemplified by the incidents of non-compliance identified and outlined in this Notice.

CWA §§ 505(a)(1) and 505(f) provide for citizen enforcement actions against any "person," including individuals, corporations, or partnerships, for violations of National Pollutant Discharge Elimination System ("NPDES") permit requirements and for unpermitted discharges of pollutants. 33 U.S.C. §§ 1365(a)(1) and (f), § 1362(5). An action for injunctive relief under the CWA is authorized by 33 U.S.C. § 1365(a). Violators of the Act are also subject to an assessment of civil penalties of up to \$32,500 per day/per violation for all violations occurring through January 12, 2009, and \$37,500 per day/per violation for all violations occurring after January 12, 2009, pursuant to Sections 309(d) and 505 of the Act, 33 U.S.C. §§ 1319(d), 1365. *See also* 40 C.F.R. §§ 19.1-19.4.

The CWA requires that any Notice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto shall include sufficient information to permit the recipient to identify the following:

1. *The specific standard, limitation, or order alleged to have been violated.*

Based on information thus far received, River Watch believes pollutants including, but not limited to, spent solvents, oil, heavy metals, ethylene glycol, acid/alkaline wastes, and detergents, are discharged from marine engine and electrical repair and maintenance operations at the Drake Marine facility. River Watch contends the Discharger has no individual facility NPDES permit for these discharges, and has failed and is failing to apply for coverage and comply with the General Industrial Storm Water Permit, NPDES Permit No. CA S000001, State Water Resources Control Board, Order No. 92-12-DWQ as amended by Order No. 97-03-DWQ ("General Permit"). These discharges are in violation of the CWA's prohibition with regard to discharging a pollutant from a point source to a water of the United States, in this instance south San Francisco Bay, pursuant to CWA § 301(a), 33 U.S.C. § 1311(a) and 33 U.S.C. § 1365(f).

Without obtaining coverage under, and complying with the terms of, the General Permit, the Discharger has failed to prepare and implement a Storm Water Pollution Prevention Plan ("SWPPP,") failed to develop and implement a Monitoring and Reporting Program, and failed to implement Best Available Technology Economically Achievable ("BAT") and Best Conventional Pollutant Control Technology ("BCT") to control the discharge of pollutants in storm water at the South San Francisco facility.



2. *The activity alleged to constitute a violation.*

Operations at Drake Marine include the repair, maintenance, installation and replacement of gas and diesel marine engines, as well as electrical and plumbing operations (see <http://www.drakemarine.com/>; March 4, 2013). The work, covered under Standard Industrial Code ("SIC") 3732 (Ship and Boat Building and Repairing) is conducted both indoors and outdoors. The outdoor work is undertaken on an asphalt paved yard that slopes toward one or more storm drains and the waters of south San Francisco Bay. Both the storm drains and the navigable waters of the Bay are in close proximity to the Drake Marine site. Because the property on which the Drake Marine site is located is subject to rain events, a range of pollutants including, but not limited to, used fluids, cleansers, and degreasers can discharge to the south San Francisco Bay. Eyewitness observations identify oil stains on the outdoor pavement, as well as exposed parts and equipment.

To properly regulate these activities and control the discharge of these types of pollutants, the State Water Resources Control Board requires industrial facilities to obtain an individual NPDES permit or seek coverage under the General Permit (or obtain exemption under the terms of the General Permit from its requirements). Review of the public record by River Watch does not reveal Drake Marine or the Discharger having obtained any required permit coverage under the CWA.

3. *The person or persons responsible for the alleged violation.*

The person or persons responsible for the alleged violations is Drake Marine, Drake Marine, Inc., and the owners of that business and business entity.

4. *The location of the alleged violation.*

The location or locations of the point sources from which the pollutants identified in this Notice are discharged in violation of the CWA is the permanent address of the Drake Marine facility at 671 Marina Boulevard in the City of South San Francisco, California 94080, and includes the adjoining navigable waters of south San Francisco Bay, a water of the United States.

5. *The date or dates of violation or a reasonable range of dates during which the alleged activity occurred.*

The range of dates covered by this Notice is from March 4, 2008 to March 4, 2013. River Watch will from time to time update this Notice to include violations which occur after the range of dates covered by this Notice. Some of the violations are continuous in nature, therefore each day constitutes a violation.

6. *The full name, address, and telephone number of the person giving notice.*

The entity giving this notice is California River Watch, 290 S. Main Street, #817, Sebastopol, CA 95472, referred to throughout this Notice as "River Watch." River Watch is a 501(c)(3) non-profit, public benefit corporation organized under the laws of the State of California, dedicated to protect, enhance and help restore the surface waters and groundwater of the State of California including all rivers, creeks, streams, wetlands, vernal pools and tributaries. River Watch may be contacted via email: [US@ncriverwatch.org](mailto:US@ncriverwatch.org), or through its attorneys.

River Watch has retained legal counsel with respect to the issues set forth in this Notice. All communications should be addressed to:

Jack Silver, Esq.  
Law Offices of Jack Silver  
David Weinsoff, Esq.  
P.O. Box 5469  
Santa Rosa, CA 95402-5469  
Tel. 707 528-8175  
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## **BACKGROUND**

CWA § 301(a), 33 U.S.C. §1311(a), prohibits the discharge of any pollutant into waters of the United States unless such discharge is in compliance with various enumerated sections of the Act. In addition to the general discharge prohibition, Section 301(a) prohibits discharges not authorized by, or in violation of, the terms of an individual NPDES permit or a general NPDES permit issued pursuant to CWA § 402(p), 33 U.S.C. §1342.

As background, in 1987 Congress amended the Clean Water Act, adding among other provisions Section 402(p). CWA § 402(p) is entitled Municipal and Industrial Stormwater Discharges, and states:

"(1) General rule. Prior to October 1, 1994, the Administrator or the State (in the case of a permit program approved under section 402 of this Act [this section]) shall not require a permit under this section for discharges composed entirely of stormwater."

Pollutants found on the Drake Marine site are not "incidental" to stormwater runoff and cannot be considered "entirely storm water" for purposes of CWA § 402(p). They are incidental only to the Discharger's onsite activities and would be nearly the same regardless of whether this facility was in an urban or rural setting.



CWA § 402(p), 33 U.S.C. §1342(p), establishes a framework for regulating storm water discharges under the NPDES program. States with approved NPDES permitting programs are authorized under this section to regulate storm water discharges through permits issued to dischargers and/or through the issuance of a single, statewide general permit applicable to all storm water dischargers. Pursuant to CWA § 402, the Administrator of the U.S. EPA has authorized California's State Water Resources Control Board to issue NPDES permits including general NPDES permits in California. The State Board elected to issue a statewide general permit for industrial discharges, and issued the General Permit on or about November 19, 1991, modified the General Permit on or about September 17, 1992, and reissued the General Permit on or about April 17, 1997.

In order to discharge storm water lawfully in California, industrial dischargers must comply with the terms of the General Permit or have obtained an individual NPDES permit and complied with its terms.

The General Permit contains certain absolute prohibitions:

- » Discharge Prohibition A(1) prohibits the direct or indirect discharge of materials other than storm water ("non-storm water discharges"), which are not otherwise regulated by a NPDES permit, to waters of the United States.
- » Discharge Prohibition A(2) prohibits storm water discharges and authorized non-storm water discharges that cause or threaten to cause pollution, contamination, or nuisance.
- » Section B(14) requires dischargers to submit an "Annual Report" by July 1 of each year to the executive officer of the relevant Regional Water Quality Control Board. Section A(9)(d) requires the discharger to include in the Annual Report an evaluation of its storm water controls, including certifying compliance with the General Permit. *See also* Sections C(9), C(10).
- » Receiving Water Limitation C(1) prohibits storm water discharges to any surface or ground water that adversely impact human health or the environment.
- » Receiving Water Limitation C(2) prohibits storm water discharges that cause or contribute to an exceedance of any applicable water quality standard contained in a Statewide Water Quality Control Plan or the applicable Regional Water Quality Control Board Basin Plan.
- » Dischargers must eliminate all non-storm water discharges to storm water conveyance systems other than those specifically set forth in Special Condition D(1)(a) and meeting each of the conditions set forth in Special Condition D(1)(b).

In addition to absolute prohibitions, the General Permit contains a variety of substantive and procedural requirements that dischargers must meet. Facilities discharging, or having the potential to discharge, storm water associated with industrial activity that have not obtained an individual NPDES permit must apply for coverage under the General Permit by filing a Notice of Intent ("NOI"). The General Permit requires existing dischargers to file NOIs before March 30, 1992.

Dischargers must also develop and implement a SWPPP, which must comply with the standards of BAT and BCT. The SWPPP must, among other requirements:

- » Identify and evaluate sources of pollutants associated with industrial activities that may affect the quality of storm and non-storm water discharges from the facility and identify and implement site-specific BMPs to reduce or prevent pollutants associated with industrial activities in storm water and authorized non-storm water discharges [Section A(2)]. BMPs must implement BAT and BCT [Section B(3)].
- » Include a description of individuals and their responsibilities for developing and implementing the SWPPP [Section A(3)].
- » Include a site map showing the facility boundaries, storm water drainage areas with flow pattern and nearby water bodies, the location of the storm water collection, conveyance and discharge system, structural control measures, impervious areas, areas of actual and potential pollutant contact, and areas of industrial activity [Section A(4)].
- » Include a list of significant materials handled and stored at the site [Section A(5)].
- » Include a description of potential pollutant sources including industrial processes, material handling and storage areas, dust and particulate generating activities, and a description of significant spills and leaks, a list of all non-storm water discharges and their sources, and a description of locations where soil erosion may occur [Section A(6)].
- » Include an assessment of potential pollutant sources at the facility and a description of the BMPs to be implemented that will reduce or prevent pollutants in storm water discharges and authorized non-storm water discharges, including structural BMPs where non-structural BMPs are not effective [Section A(7), (8)].
- » Be periodically evaluated to ensure effectiveness and must be revised where necessary [Section A(9),(10)].

As stated above, River Watch contends that in the operation of the Drake Marine facility, the Discharger has failed and is failing to comply with the terms and conditions of the General Permit requiring the preparation, implementation, review and update of an adequate SWPPP, the elimination of all non-authorized storm water discharges, and the development and implementation of an adequate monitoring and reporting program.

As part of a monitoring program, dischargers must identify all storm water discharge locations that produce a significant storm water discharge, evaluate the effectiveness of BMPs in reducing pollutant loading, and evaluate whether pollution control measures set out in the SWPPP are adequate and properly implemented. Dischargers must conduct visual observations of these discharge locations for at least one storm per month during the wet season (October through May) and record their findings in an Annual Report. Dischargers must also collect and analyze storm water samples from at least two storms per year in compliance with the criteria set forth in Section B(5). Dischargers must also conduct dry season visual observations to identify sources of non-storm water pollution in compliance with Section B(7).

The Regional Water Quality Control Board has established water quality standards for the San Francisco basin. This Basin Plan includes a narrative toxicity standard and a narrative oil and grease standard. The Basin Plan provides that "[w]aters shall not contain suspended material in concentrations that cause nuisance or adversely affect beneficial uses." The Basin Plan establishes limits on metals, solvents, pesticides and other hydrocarbons.

The EPA has established Parameter Benchmark Values as guidelines for determining whether a facility discharging storm water has implemented the requisite BAT and BCT. 65 Fed. Reg. 64746, 64767 (Oct. 30, 2000). California Toxic Rule limitations are also applicable to all non storm water and storm water discharges. (40 C.F.R. part 131).

## VIOLATIONS

River Watch contends that between March 4, 2008 and March 4, 2013, the Discharger violated the CWA, the Basin Plan and the Code of Federal Regulations by reason of discharging pollutants to waters of the United States from the Drake Marine facility without an individual NPDES permit, without compliance with the General Permit, or in violation of the General Permit.

The violations discussed herein, impacting south San Francisco Bay, are derived from eye witness reports and records publicly available, or from records in the possession and control of the Discharger. Furthermore, River Watch contends these violations are continuing. Halting the discharge of pollutants to this important regional and national waterway is critical if it is to sustain both maritime and natural habitats for bird, animal, and plant life.



## REMEDIAL MEASURES REQUESTED

Implementation of the following remedial measures are necessary in order to bring the Discharger into compliance with the CWA and to reduce the biological impacts of its non-compliance upon public health and the environment surrounding the Drake Marine facility:

- A. Prohibition of the discharge of pollutants including, but not limited to, spent solvents, oil, heavy metals, ethylene glycol, acid/alkaline wastes, and detergents from the repair, maintenance, installation and replacement of gas and diesel marine engines, as well as electrical and plumbing operations all taking place on the Drake Marine facility and site;
- B. Compliance with the terms and conditions of the General Permit, and BMPs detailed in the EPA's Industrial Stormwater Fact Sheet Series, Sector R: Ship and Boat Building or Repair Yards" (EPA Office of Water, EPA-833-F-06-033, December 2006; ([www.epa.gov/npdes/pubs/sector\\_r\\_shipbuilding.pdf](http://www.epa.gov/npdes/pubs/sector_r_shipbuilding.pdf));
- C. Compliance with the storm water sampling, monitoring and reporting requirements of the General Permit as they pertain to the Drake Marine site;
- D. Sampling of storm water at least four (4) times each year over each of the next five (5) years. Sampling to take place:
  - 1. At "first flush"
  - 2. At the first significant rain after "first flush"
  - 3. At the first significant rain after April 1
  - 4. At the second significant rain after April 1.

Any discharge from the Drake Marine site and facility to a water of the United States must be sampled during the four (4) sampling events identified;

- E. Preparation and submittal to the Regional Water Quality Control Board of a "Reasonable Potential Analysis" for the Drake Marine site and its operations;
- F. 100% of the discharge from the Drake Marine site and facility must be discharged through discrete conveyances; and,



- G. Preparation of an updated SWPPP including a monitoring program, with a copy to be provided to River Watch.

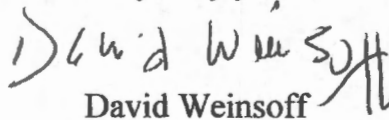
### CONCLUSION

The violations set forth in this Notice effect the health and enjoyment of members of River Watch who reside and recreate in the affected community. Members of River Watch use south San Francisco Bay and the affected watershed for recreation, sports, fishing, swimming, hiking, photography, nature walks and the like. Their health, use and enjoyment of this natural resource is specifically impaired by the Discharger's violations of the CWA as set forth in this Notice.

River Watch believes this Notice sufficiently states grounds for filing suit. At the close of the 60-day notice period or shortly thereafter River Watch has cause to file a citizen's suit under CWA § 505(a) against the Discharger for the violations of the CWA identified.

During the 60-day notice period, River Watch is willing to discuss effective remedies for the violations identified in this Notice. However, if the Discharger wishes to pursue such discussions in the absence of litigation, it is suggested those discussions be initiated soon so that they may be completed before the end of the 60-day notice period. River Watch does not intend to delay the filing of a lawsuit if discussions are continuing when the notice period ends.

Very truly yours,

  
David Weinsoff

DW:lmh  
Attachment A - Map

cc:

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Executive Director  
State Water Resources Control Board  
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Sacramento, CA 95812

✓ Regional Administrator  
U.S. Environmental Protection Agency  
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Executive Officer  
Regional Water Quality Control Board  
San Francisco Bay Region  
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Oakland, CA 94612



Google

To see all the details that are visible on the screen, use the "Print" link next to the map.



ATTACHMENT A